



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for June 3, 2022

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and they are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

BOARD DECISIONS

Appellant: Harinder Singh

Agency: U.S. Postal Service

Decision Number: [2022 MSPB 15](#)

Docket Numbers: SF-0752-15-0014-I-1, SF-0752-15-0155-I-1

ADVERSE ACTION

PENALTY

DISPARATE PENALTY

DUE PROCESS

NOT IN ACCORDANCE WITH LAW

The agency removed the appellant based on charges of misuse of position, acceptance of gifts from subordinates, and improper conduct. After the appellant filed a Board appeal challenging his removal, the agency issued a new letter of decision, rescinding its prior removal decision and instead demoting the appellant and providing him with backpay for the period during which his removal was in effect. The appellant appealed the agency's demotion action. The administrative judge joined the removal and demotion appeals. The administrative judge issued an initial decision affirming the appellant's demotion, finding that the agency proved its charges of misuse of position and improper conduct, but did not prove its charge of acceptance of gifts from subordinates. Notwithstanding its failure to prove one of its charges, the administrative judge found that demotion was a reasonable

penalty. The administrative judge also found that the agency fully rescinded the removal action and provided the appellant with all of the relief he could have received in his removal appeal. On review, the appellant argued, among other things, that the administrative judge erred in denying his motion to compel discovery related to the consistency of the penalty imposed on employees for the same or similar offenses.

Holding: The administrative judge did not abuse her discretion in denying the appellant's motion to compel the agency to produce information about potential comparators agency-wide.

1. The Board's disparate penalty analysis in certain cases represents a departure from the standard set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), which calls for comparison with penalties "imposed upon other employees *for the same or similar offenses*."
 - a. The Board overruled cases in which it previously found that broad similarity in misconduct between the appellant and the comparator was sufficient to shift the burden to the agency to explain the difference in treatment, including the following: *Figueroa v. Department of Homeland Security*, 119 M.S.P.R. 422 (2013); *Villada v. U.S. Postal Service*, 115 M.S.P.R. 268 (2010); *Woebcke v. Department of Homeland Security*, 114 M.S.P.R. 100 (2010), *abrogated in part on other grounds as recognized in Bowman v. Small Business Administration*, 122 M.S.P.R. 217 (2015); *Lewis v. Department of Veterans Affairs*, 113 M.S.P.R. 657 (2010), and their progeny.
 - b. The Board also overruled *Portner v. Department of Justice*, 119 M.S.P.R. 365, ¶¶ 2-6, 9 (2013), and *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640, ¶¶ 2-13, 20-29 (2012), to the extent they held that the disparate penalty analysis should extend beyond the same or similar offenses.
2. The Board clarified the proper standards for analyzing disparate penalty claims
 - a. A comparator need not always have to be in the same work unit or under the same supervisor, however, the fact that two employees come from different work units and/or supervisory chains remains an important factor in determining whether it is appropriate to compare the penalties they are given. In most cases, employees from another

work unit or supervisory chain will not be proper comparators.

- b. In assessing an agency's penalty determination, the relevant inquiry is whether the agency knowingly and unjustifiably treated employees differently.
- c. The consistency of the penalty with those imposed upon other employees for the same or similar offenses is not the sole outcome determinative factor, but rather, it is simply one of a nonexhaustive list of 12 factors that are relevant for consideration in determining the appropriateness of the penalty.
- d. The fact that one employee receives a more severe penalty than that imposed on a comparator who has committed the same or similar misconduct should be considered in favor of mitigating a penalty, but mitigation is by no means required in all such cases.
- e. There will often be a range of penalties that would fall within the tolerable limits of reasonableness. That an agency chooses to impose a penalty at the more lenient end of that range in one case should not mean that it cannot impose a penalty at the more severe end of that range in another case.

Holding: The deciding official's communication seeking clarification from a headquarters agency official about whether the appellant's actions were improper was not a due process violation because it did not introduce new and material information, but rather merely clarified or confirmed the information that was already in the record.

- 1. The effect of the ex parte communication was to confirm to the deciding official that the appellant's actions were in fact improper, just as the agency indicated in the notice of proposed removal.

Holding: The appellant failed to show that his demotion was *ultra vires* or otherwise procedurally improper.

- 1. The demotion action was not *ultra vires* because the appellant did not claim that the deciding official lacked the authority to demote him.
- 2. The appellant failed to show that the decision to demote him was made by someone other than the deciding official.

Holding: The penalty of demotion was reasonable.

Appellant: Jane Carol Malloy
Agency: Department of State
Decision Number: [2022 MSPB 14](#)
Docket Number: NY-0752-15-0064-I-1

**ADVERSE ACTION
JURISDICTION
“EMPLOYEE”**

The appellant, a nonpreference eligible, filed a Board appeal challenging her 30-day suspension from an excepted-service Technical Information Specialist position at the United States Mission to the United Nations (USUN). The agency moved to dismiss the appeal for lack of jurisdiction because the appellant was appointed to her position under 22 U.S.C. § 287e without regard to the civil service laws.

After affording the appellant an opportunity to respond to a show cause order, the administrative judge dismissed the appeal for lack of jurisdiction, finding that 22 U.S.C. § 287e exempted USUN employees from the appointment provisions of title 5. In so finding, the administrative judge relied upon an Office of Personnel Management (OPM) regulation, 5 C.F.R. § 752.401(d)(12), which states that “[a]n employee whose agency or position has been excluded from the appointing provisions of title 5, United States Code, by separate statutory authority” is excluded from coverage of 5 U.S.C. chapter 75 unless there is a provision specifically placing those employees under the protections of chapter 75. The administrative judge found that 22 U.S.C. § 287e constituted a separate statutory authority that exempted USUN employees from the appointment provisions of title 5 and the appellant did not identify any statutory authority placing her under the protections of chapter 75. The administrative judge also relied on *Suzal v. Director, U.S. Information Agency*, 32 F.3d 574, 578-79 (D.C. Cir. 1994), in which the U.S. Court of Appeals for the D.C. Circuit held that “it would distort the statutory language to hold that people employed ‘without regard to the civil service . . . laws’ are actually covered by all the civil service laws applicable to members of the excepted service.”

Holding: An employee appointed under 22 U.S.C. § 287e is not excluded from the adverse action protections of chapter 75.

1. In *Lal v. Merit Systems Protection Board*, 821 F.3d 1376 (Fed. Cir. 2016), the U.S. Court of Appeals for the Federal Circuit addressed whether an employee appointed pursuant to 42 U.S.C. § 209(f) was excluded from

chapter 75 protections considering the Civil Service Due Process Amendments of 1990 (Due Process Amendments), 5 U.S.C. § 7511. The court held:

- a. “absent a specific exclusion of appeal rights or exemption from section 7511’s definition of employee, a statute exempting an appointment from the civil-service laws cannot escape the broad reach of [the] Due Process Amendments and therefore does not strip the Board of jurisdiction to hear an appeal from an adverse action”; and
 - b. “[t]o the extent the OPM’s implementing regulation at 5 C.F.R. § 752.401(d)(12) calls for a result contrary to the plain meaning of 5 U.S.C. § 7511 and 42 U.S.C. § 209(f), ‘it has no force or effect in this case.’”
2. Applying *Lal*, the Board held that 22 U.S.C. § 287e does not foreclose Board jurisdiction over the appellant’s adverse action appeal because it contains no language exempting appointees from the definition of employee under 5 U.S.C. § 7511 or specifically excluding chapter 75 appeal rights as it explicitly does regarding chapter 51 and subchapter III of chapter 53.
 3. *Suzal v. Director, U.S. Information Agency*, 32 F.3d 574 (D.C. Cir. 1994), upon which the administrative judge relied, and which appears to be a contradictory ruling from the D.C. Circuit, is not controlling authority upon the Board.

COURT DECISIONS

NONPRECEDENTIAL:

Knight v. Department of Veterans Affairs, [No. 2022-1169](#) (Fed. Cir. May 31, 2022) (granting the Department of Veterans Affairs’ motion to remand to allow the arbitrator to reconsider the standard of proof and reasonableness of the penalty in light of certain Federal Circuit decisions the petitioner raised in post-arbitration briefing).

Lau v. Merit Systems Protection Board, [No. 2022-1289](#) (Fed. Cir. May 31, 2022) (MSPB Docket No. DE-1221-21-0300-W-1) (granting the Board’s motion for remand, vacating the Board’s decision, and remanding the case so that the administrative judge can reevaluate whether the petitioner established jurisdiction over her individual right of action appeal and to consider Board precedent holding that disclosures about a

private organization that administers a Government program may be protected).

[MSPB](#) | [Case Reports](#) | [Recent Decisions](#) | [Follow us on Twitter](#) | [MSPB Listserv](#)